

FEDERAL CIRCUIT COURT OF AUSTRALIA

IBRAHIM v MINISTER FOR IMMIGRATION & ANOR [2015] FCCA 2204

Catchwords:

MIGRATION – Administrative Appeals Tribunal (Migration and Refugees Division) – Partner (Residence) (Class BS) visa – whether the Tribunal failed to consider all the applicant’s claims and evidence – whether the Tribunal correctly considered the relevant legislation – whether the Tribunal’s findings on credibility lacked an evident and intelligible justification – no jurisdictional error – application dismissed.

PRACTICE AND PROCEDURE – Application for adjournment – application refused.

Legislation:

Migration Act 1958 (Cth), s.476

Migration Regulations 1994, reg.1.15A

Applicant: AHMED ABDELHAMID ALI IBRAHIM

First Respondent: MINISTER FOR IMMIGRATION &
BORDER PROTECTION

Second Respondent: ADMINISTRATIVE APPEALS
TRIBUNAL

File Number: SYG 1186 of 2015

Judgment of: Judge Street

Hearing date: 14 August 2015

Date of Last Submission: 14 August 2015

Delivered at: Sydney

Delivered on: 14 August 2015

REPRESENTATION

The Applicant appeared in person

Solicitors for the Respondents: Mr L Gell
 Clayton Utz

ORDERS

- (1) The name of the Second Respondent be amended to the Administrative Appeals Tribunal and the filing of any further documents in this regard is dispensed with.
- (2) The application is dismissed.
- (3) The Applicant pay the First Respondent's costs fixed in the amount of \$6825.

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 1186 of 2015

AHMED ABDELHAMID ALI IBRAHIM

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

1. This is an application within the Court's jurisdiction under s.476 of the *Migration Act 1958* (Cth) for a Constitutional writ in respect of a decision of the Tribunal made on 16 April 2015 affirming a decision of the delegate not to grant the applicant a Partner (Residence) (Class BS) visa. The applicant is a national of Egypt and arrived in Australia on 11 May 2007 on a student visa. On 11 July 2011, the applicant applied for a partner visa. On 30 April 2014, the delegate refused to grant the partner visa and, on 8 May 2014, the applicant applied for review before the Tribunal.
2. On 3 March 2015, the applicant was invited to attend a hearing on 9 April 2015, consistent with the statutory regime, and the applicant appeared before the Tribunal on 9 April 2015 to give evidence and

present arguments. The applicant refused to grant the visa, on the basis that the applicant did not meet cl.801.221 because the delegate was not satisfied the applicant was in a genuine and continuing spousal relationship with his sponsor. The Tribunal identified the background and age of the applicant and the background and age of the sponsoring spouse.

3. The applicant was granted a Temporary Partner visa subclass 820 on 7 June 2013 and, on 18 June 2013, the applicant's migration agent wrote to the Department requesting documents be sent to enable the applicant to obtain a permanent visa. On 26 June 2013, the applicant's migration agent provided additional documents to the department and on 10 October 2013, the Department contacted the applicant's migration agent to request further documents, which were provided on 16 October 2013 and 13 November 2013, including statutory declarations by the applicant and his sponsor and written statutory declarations.
4. The delegate identified that the financial information provided did not show that the parties had pooled their financial resources or used their joint account for everyday living expenses, and identified that there was little information to demonstrate the parties cohabited or maintained a joint household. The delegate found that there was insufficient information to support the parties lived together as a couple at the same address, and that there was no evidence of social interaction with family and friends. The delegate found there was no evidence to support that the parties provided companionship and emotional support to one another and that the applicant had travelled overseas without the sponsor. The delegate was not satisfied the applicant and his sponsor were in a genuine and continuing spousal relationship.
5. The Tribunal noted that prior to the hearing the applicant provided further documents to the Tribunal. At the hearing, the applicant confirmed that he and his sponsor were now divorced, and the Tribunal explored with the applicant the reasons for the breakdown in that relationship. The applicant has known his current partner for four years, and they were married at a ceremony in May 2014. The Tribunal noted that they are not legally married, because the applicant's divorce has only recently been granted.

6. The Tribunal noted the evidence given by the witnesses and raised with the applicant the inconsistency in the oral evidence between the applicant and the sponsor as to when they had separated. The Tribunal concluded that the applicant was not a credible witness. The Tribunal set out reasons in relation to the adverse finding in respect of the applicant's credit. The Tribunal noted that there is no dispute, and the Tribunal accepted that the applicant was not at the time of the Tribunal's decision the spouse of the sponsoring spouse and, therefore, did not meet the criteria in cl.801.221(2)(c).
7. The Tribunal noted that the applicant claimed that he met the criteria on the basis that he was in a genuine and continuing relationship at the time of the application and that the relationship between the applicant and the sponsoring spouse had ceased and that he suffered family violence committed by the sponsoring spouse. The Tribunal noted that the provision of cl.801.221(6) indicated that a relevant genuine partner relationship within the meaning of the Act must have existed prior to the relationship ceasing, and the applicant would otherwise have met the criteria under cl.801.221(2).
8. The Tribunal then proceeded to evaluate the evidence in relation to whether all the aspects of the parties' relationship supported there being a genuine partnership relationship. The Tribunal referred to the financial aspects and found:

50. The Tribunal does not accept on the basis of the evidence before it that the parties ever pooled their financial resources or shared day-to-day household expenses.

51. The financial aspects of the relationship are not consistent with the parties being in a genuine and continuing spouse relationship at any time.
9. The Tribunal referred to the nature of the household and found:

58. The Tribunal finds that the evidence presented as to the nature of the parties' household is not consistent with the applicant and his sponsor being in a genuine and continuing relationship at any time.
10. The Tribunal referred to the social aspects of the relationship and relevantly found:

65. The Tribunal finds that the social aspects of the relationship were not consistent with the parties being in a genuine and continuing relationship at any time.

11. The Tribunal referred to the nature of the persons' commitment to each other and relevantly found:

71. There is little independent evidence of any commitment to the relationship by either party. The Tribunal is not prepared to accept that the applicant and his sponsor ever provided one another with emotional support or that they saw the relationship as long-term.

72. After considering the evidence before it the Tribunal has concluded that the nature of the commitment the applicant and his sponsor showed to each other was not indicative of a genuine and continuing spousal relationship.

12. It was in those circumstances the Tribunal found:

73. Given the above findings, the Tribunal is not satisfied that the parties ever had a mutual commitment to a shared life as husband and wife to the exclusion of all others and that the relationship was genuine and continuing at any time. The Tribunal is not satisfied that the parties have ever lived together or did not live separately and apart on a permanent basis. The Tribunal therefore finds that the applicant does not meet the definition of 'spouse' in s.5F(2)(b)-(d).

74. Therefore the Tribunal is not satisfied that the applicant meets cl.801.221 (6).

75. As is indicated above, in order to rely upon a claim that the applicant satisfies the criteria in cl.801.221 (6) the applicant must show that he would meet the requirements of cl.801.221 (2), including the requirement of being the spouse of the sponsoring partner, except that the relationship has ceased. As the Tribunal has found that the applicant and his sponsor were never in a spousal relationship as defined in s.5F of the Act the applicant does not meet the criteria in cl.801.221(6) and it is not necessary to assess the claim of family violence.

76. There is no evidence to indicate that applicant meets the alternative criteria contained in cl.801.221.

77. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

13. The grounds of the application are as follows
- 1. The Tribunal failed to consider all evidence provided.*
 - 2. The Tribunal failed to consider other legislation.*
 - 3. The Tribunal failed to acknowledge veracity of claims and evidence submitted in support of the application.*
14. There is no substance in relation to ground 1, and it fails to disclose any jurisdictional error. It is clear that the Tribunal carefully looked at the evidence in relation to the issue before the Tribunal.
15. In relation to ground 2, it is clear that the Tribunal carefully considered the applicable legislative provisions, which relevantly included attaching the extract from the *Migration Regulations 1994* reg.1.15A in relation to spouses, as well as the statutory provisions, which were identified in para.45 of the Tribunal's reasons. There is no substance in relation to ground 2.
16. In relation to ground 3, it was a matter for the Tribunal to evaluate the applicant's credibility, and there is no jurisdictional error that arises by reason of the rejection of the applicant's credit. The adverse findings were clearly open on the material before the Tribunal, and the adverse findings cannot be said to lack an evident and intelligible justification. No jurisdictional error is identified by ground 3.
17. This was a matter in which the Court made orders fixing the matter for hearing on 4 June 2015 providing the applicant with an opportunity to amend the application to put on affidavit material and also to put on submissions. The applicant attended that directions hearing on 4 June 2015 and was provided with a copy of the orders of the Court fixing the matter for hearing.
18. At the commencement of today's hearing, the applicant, assisted by his now-partner, sought an adjournment on the grounds that the applicant had found a solicitor, who was identified and was said to be now likely to be able to assist the applicant in about three weeks' time. The applicant, through his partner, explained that he had been overseas attending in relation to his sick relative, being his father, and it was not until the applicant returned that steps were able to try and identify a solicitor.

19. The first respondent opposed the adjournment, identifying that orders were made on 4 June 2015 and that the applicant was present on that occasion and was well aware of the hearing date and that there was no explanation for the failure to take steps from 4 June 2015 and following in relation to the obtaining of a solicitor, quite apart from the fact the original application was filed on 30 April 2015.
20. Mr Gell for the first respondent said that the explanations advanced were inadequate and that there was no evidence supporting the grounds of the application for an adjournment and that the explanations advanced were unsatisfactory even if treated as being evidence. Mr Gell also raised that an adjournment was, in this case, one in which the Court should take into account the weakness of the grounds identified in the application. The Court declined an adjournment, being satisfied that there is no utility in granting an adjournment in the circumstance of this case.
21. I accept Mr Gell's submission that the explanation, in the circumstances where the proceedings were commenced on 30 April 2015 and orders were made on 4 June 2015 fixing the matter for hearing, were insufficient to justify the grant of an adjournment in circumstances where the case, on its face, is doomed to failure and an adjournment will only increase the costs of the parties and utilise further limited court time.
22. It is for the above reasons that the adjournment is refused. The application fails to disclose any jurisdictional error. The application is dismissed.

I certify that the preceding twenty-two (22) paragraphs are a true copy of the reasons for judgment of Judge Street

Associate:

Date: 18 August 2015